

BEFORE THE KANSAS WORKERS COMPENSATION BOARD

Docket No. 1,066,283

ORDER

Respondent and its insurance carrier (respondent) request review of the November 20, 2014, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral arguments on April 14, 2015.

APPEARANCES

C. Albert Herdoiza, of Kansas City, Kansas, appeared for claimant. Shelly E. Naughtin, of Overland Park, Kansas, appeared for respondent

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant permanent partial disability (PPD) benefits based on an 84.5 percent permanent functional impairment to his left eye. The ALJ found respondent tacitly approved of claimant working without safety glasses, and therefore held the “willful failure” defense embodied in K.S.A. 2013 Supp. 44-501(a)(1)(C) did not apply. The ALJ also found claimant was unaware eye protection was available from respondent and accordingly ruled the “reckless violation” defense set forth in K.S.A. 2013 Supp. 44-501(a)(1)(D) did not apply.

Respondent argues this claim should be denied because claimant willfully failed to use safety glasses provided by respondent and recklessly violated respondent's safety rule requiring the use of such glasses. Claimant urges the Board to affirm the Award.

The issues are:

1. Did claimant's injury result from claimant's willful failure to use a reasonable guard and protection voluntarily furnished to claimant by respondent?

2. Did claimant's injury result from claimant's reckless violation of respondent's workplace safety rules or regulations?

FINDINGS OF FACT

Testimony of Claimant

Claimant started working for respondent in June 2014. Claimant's job required mowing grass with a riding mower and trimming with a gas powered "weed eater."

Claimant testified respondent did not provide him with safety glasses before his accidental injury. According to claimant, he realized on his first day working for respondent, he needed glasses to protect his eyes from the sun and to cover his eyes. Claimant purchased a pair of sunglasses the same day. Claimant testified Raul Patraca and two other employees of respondent were with him when he purchased the sunglasses. The other two employees bought glasses at the same time because their glasses were scratched. Claimant and the other two employees wore their new glasses when they returned to work that day. Claimant asserted Lonnie DuPree, the owner of respondent, and Sandro Garcia, a supervisor, did not tell him, or the other two employees, they were wearing the wrong type of glasses.

On July 15, 2014, claimant was working with Mr. Garcia. He was trimming with a weed eater, when something flew up from the weed machine, piercing claimant's sunglasses and striking his left eye and nose. Claimant testified the object left a hole in the lens about the size of a dime and knocked the sunglasses off his face. Claimant put the sunglasses back on and continued working. Claimant's left eye started bleeding, and he experienced a headache and "cloudy" vision. Claimant reported his accidental injury to Mr. Garcia.

Claimant testified Mr. Garcia telephoned Lonnie DuPree after the injury. Mr. DuPree told Mr. Garcia to give claimant a pair of safety glasses. Claimant testified he continued working wearing a new pair of safety glasses provided by respondent.

Claimant's left eye was ultimately treated surgically. Claimant testified the doctor who performed his surgery provided him with prescription glasses.

According to claimant, after the injury, respondent provided eye protection to all its employees, including claimant. Lonnie DuPree told the employees they must wear the glasses he provided. Claimant testified:

Q. Okay. But did anything change when you went back after being off work a month as it relates to glasses that that the - -

A. Yes.

Q. And tell me what changed.

A. He gave all of us glasses and for the ears, too.

Q. Now who is he?

A. DuPree, the boss.

Q. Okay. So, you're saying that when you went back to work you realized that they were now giving the workers glasses and safety equipment?

A. Yes. And then he talked to me about safety.

Q. Okay. Had anybody ever talked to you about safety before the accident?

A. No.

Q. Had anybody ever offered you those safety glasses and ear protections that you're talking about before the accident?

A. No.

Q. Did any of the other workers that you worked with have those safety glasses or ear protectors that were given to you guys after your accident? Did anybody have those before the accident?

A. No.¹

. . .

Q. Do you remember anybody before your accident wearing DuPree-distributed safety glasses?

¹ Claimant's Depo. (April 18, 2014) at 44-45.

A. No.²

. . .

Q. Now, after your accident, if I understand your testimony, and your return from surgery, everybody or mostly everybody was wearing DuPree-distributed safety glasses; is that correct?

A. Yes, everybody.

Q. And upon your return to work after your surgery, you were given a pair of DuPree-distributed safety glasses to wear while you continued to work for DuPree Landscaping, correct?

A. Yes.

Q. And did you wear them every day until they let you go?

A. Yes.

Q. If DuPree Landscaping company had told you before your accident that you needed to wear DuPree-distributed safety glasses and had actually given them out, is there any reason you wouldn't have used them?

A. No.

Q. You would have worn them. According to Lonnie DuPree, he was giving them out for free.

A. Yes.

Q. You wouldn't have gone to a gas station to buy sunglasses and pay out of your own pocket if Lonnie DuPree was handing out DuPree-distributed safety glasses for free, would you?

A. If he had given me glasses to wear that day, then there was no need for me to go to the gas station to buy a pair of glasses.³

² R.H. Trans. (Oct. 3, 2014) at 21.

³ *Id.* at 22-23.

Testimony of Raul Patraca

Raul Patraca, a former employee of respondent, testified he mowed lawns for respondent and was familiar with all the jobs performed by employees of respondent. He saw Lonnie DuPree, Dominick DuPree (son of Lonnie) and Sandro Garcia daily. Mr. Garcia was Mr. Patraca's supervisor.

Mr. Patraca testified that when he started working for respondent, he wore glasses he received from a previous employer. Mr. Patraca asserted his coworkers bought their glasses at the gas station or somewhere else. Respondent did not provide glasses for employees, who had to use their own glasses. According to Mr. Patraca, before claimant's accident, respondent did not tell employees to wear any kind of specific glasses, nor did respondent provide glasses to employees.

After claimant's accident, Lonnie DuPree, Dominick DuPree and Mr. Garcia talked to respondent's employees about wearing safety glasses. They told the employees to be careful and Lonnie DuPree gave them glasses to wear. Mr. Patraca testified respondent had 10 or 11 employees and with the rotation of crews, he worked with all of respondent's employees. All employees had glasses, but not all had safety glasses. Mr. Patraca did not hear about anyone getting into trouble for not wearing safety glasses.

Testimony of Dominique DuPree

Dominique DuPree was respondent's operations and safety supervisor. He testified he oversaw the mowing sites to ensure the jobs were completed, and was in charge of safety rules and compliance with safety rules.

Mr. DuPree testified that at the beginning of the season, respondent had a safety and operations briefing before any work occurred. Every employee had to attend the briefing in order to work. Lonnie DuPree conducted the meeting and Dominique DuPree explained the safety protocols. Mr. DuPree testified every employee was instructed to wear safety glasses at all times when on job sites, mowing and using heavy machinery. If an employee was hired after the safety meeting occurred, Lonnie DuPree gave the new employee a safety briefing.

Mr. DuPree testified respondent's safety rules were written in a handbook which was available in English and Spanish. The handbook was provided to every employee during the safety briefing at the beginning of the season, and a copy was also available in respondent's shop.

At the safety meeting in March 2013, Mr. DuPree explained the safety glasses requirement and Mr. Garcia provided translation for employees who spoke Spanish. Mr. DuPree testified he remembered claimant attending the safety meeting in 2013.

Mr. DuPree testified respondent provided employees with two pairs of safety glasses on the first day of the season or when they were hired. According to Mr. DuPree, safety glasses were shatterproof and regular sunglasses were not. If employees lost or damaged their safety glasses, they could obtain another pair from Mr. DuPree or buy their own. After giving out two pairs of safety glasses at the beginning of the season, Mr. DuPree gave out one more pair but after that, the employees were required to buy glasses for themselves.

Mr. DuPree testified that before claimant's injury, Derrell Allen, respondent's employee, failed to wear safety glasses and was disciplined by a two or three day suspension. Before claimant's accident, Mr. Dupree was unaware of any other employees who failed to wear their safety glasses.

According to Dominique DePree, Lonnie DuPree decided an employee's discipline for safety violations. Mr. DuPree testified he could suspend employees or make recommendations for other disciplinary action. To Mr. DuPree's knowledge, claimant had no safety violations prior to his accident.

Mr. DuPree testified respondent conducted another safety meeting after claimant's accident to remind employees about the protocol requiring the wearing of safety glasses. Lonnie DuPree and Dominique DuPree both spoke at the meeting and Sandro Garcia translated from English to Spanish. Safety glasses were not distributed at this meeting because respondent gave two pairs of glasses to each employee at the beginning of the season.

Testimony of Sandro Garcia

Sandro Garcia testified he worked for respondent for six or seven years as the foreman/manager, which required him to check employees' work and train new employees. At the beginning of every season, respondent conducted a meeting with employees about safety rules. According to Mr. Garcia, since claimant was not hired until after the 2013 safety meeting, Mr. Garcia explained safety procedures to claimant in Spanish.

Mr. Garcia testified respondent provided employees with a copy of the employee handbook at the beginning of every season. Mr. Garcia read the Spanish version of the handbook. He testified employees sometimes ask him to explain the handbook if they do not understand what it says. Employees sign a paper confirming they understand the handbook. Mr. Garcia is unsure if claimant received a handbook since they are only given out at the beginning of the season. Mr. Garcia testified claimant said he knew the rules because he was experienced in landscaping.

Mr. Garcia testified respondent had a policy requiring employees to wear safety glasses all times and provided safety glasses to employees at the beginning of each season. If employees break or lose the safety glasses, respondent gave them new glasses. Employees could not buy their own safety glasses and were expected to wear

the glasses provided by respondent. Mr. Garcia testified that every morning he asked if employees had their safety glasses and if not, there were spare glasses in the office. Mr. Garcia gave claimant some safety glasses when he began working and a second pair after he broke the first.

Mr. Garcia testified he worked with claimant on the day of his accident. On the way to the job site, Mr. Garcia realized claimant's glasses were not provided by respondent, but since they were halfway to the job site, he allowed claimant to work with his own glasses. Mr. Garcia stated he asked claimant if his glasses were safety glasses, and claimant responded they were safety glasses he received from another job. Claimant's sunglasses looked like safety glasses, but Mr. Garcia did not check them to see if they were in fact safety glasses.

On the day claimant returned to work after his eye surgery, there was a meeting among Lonnie DuPree, Dominique DuPree, Mr. Garcia and claimant. Claimant was told he must always use the safety glasses provided by respondent.

Mr. Garcia testified when employees broke the rules in the employee handbook they were suspended at times. The employee had to sign a paper. Mr. Garcia did not see any paperwork to discipline claimant for not wearing safety glasses after the accident.

Testimony of Lonnie DuPree

Lonnie DuPree testified his employees perform landscaping, including lawn maintenance, grass cutting, spring cleanup, and fall cleanup, using lawn mowers and weed eaters.

Respondent's safety policy stated employees must always wear safety glasses when operating equipment. Mr. DuPree testified respondent provided safety glasses for its employees. If employees wanted to wear safety glasses not provided by respondent, Mr. DuPree had to approve the glasses. Mr. DuPree testified if an employee was not wearing approved safety glasses, he would not be allowed to work.

Respondent offered evidence documenting purchases of safety glasses in 2012 and 2013. According to Mr. DuPree, the safety glasses purchased by respondent were available with clear or darker lenses, from which the employees chose.

Mr. DuPree testified respondent's employment handbook, dated January 15, 2009, contained all the rules and regulations for respondent's employees. He testified claimant started working in June instead of at the beginning of the season in March or April. Mr. DuPree, Sandro Garcia and Raul Patraca were present when claimant was hired. Mr. DuPree understood claimant had previous experience in landscaping work.

Mr. DuPree testified he explained respondent's safety policies when claimant was hired. Mr. DuPree told claimant safety glasses must always be worn when operating equipment. Mr. Garcia translated from English to Spanish.

Normally, Mr. DuPree gave a verbal warning the first time an employee failed to wear their safety glasses and a written warning for the second such violation. For a third violation, Mr. DuPree would suspend the employee for a couple of days. Other than the date of accident, Mr. DuPree was unaware of any instances in which claimant failed to wear safety glasses

Mr. DuPree testified he did not give claimant permission to wear sunglasses on the day of his accident. According to Mr. DuPree, Mr. Garcia would be outside the scope of his employment if he allowed claimant to wear other glasses on the day of his accident. Mr. DuPree told Mr. Garcia he was wrong to allow claimant to work without the safety glasses.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501 provides in relevant part:

(a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:

(A) The employee's deliberate intention to cause such injury;

(B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;

(C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;

(D) the employee's reckless violation of their employer's workplace safety rules or regulations; or

(E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

(2) Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply when it was reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

The Board holds the findings of fact set forth in the Award are amply supported by a preponderance of the credible evidence and are hereby adopted by the Board, as supplemented by the above findings. The Board also agrees with the ALJ's rationale in

concluding respondent did not sustain its burden to prove the defenses contained in K.S.A. 2013 Supp. 44-501(a). No purpose would be served in repeating the ALJ's analysis in this Order.

CONCLUSIONS

1. Claimant's injury did not result from a willful failure to use a reasonable guard and protection voluntarily furnished to claimant by respondent.

2. Claimant's injury did not result from a reckless violation of respondent's workplace safety rules or regulations.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 20, 2014, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of July, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Kenneth J. Hursh, Administrative Law Judge